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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD WAYNE COOLEY,

Defendant and Appellant.

C044186

(Super. Ct. No.
02F05985)

A jury convicted defendant Ronald Wayne Cooley of forcible rape of a child (three counts, Pen. Code, § 261, subd. (a)(2)); unlawful sex with a child under the age of 16 (Pen. Code, § 261.5, subd. (d)); lewd conduct with a child (Pen. Code, § 288, subd. (c)(1)); and assault with intent to commit rape (Pen. Code, § 220). The trial court sentenced defendant to state prison for a term of 22 years 8 months, plus 15 years to life.

On appeal, defendant asserts the trial court: (1) violated defendant's due process and equal protection rights by admitting evidence of his propensity to commit sex offenses, or,

alternatively, abused its discretion by failing to exclude the evidence pursuant to Evidence Code section 352; (2) violated defendant's due process rights when it instructed the jury on propensity evidence pursuant to CALJIC No. 2.50.01; (3) abused its discretion by denying defendant's motion to substitute counsel; (4) abused its discretion by failing to declare a doubt as to defendant's mental competency when defendant was on suicide watch during trial; and (5) violated his constitutional rights when it imposed upper and consecutive sentencing terms without trying the factual basis for them before a jury and under the reasonable doubt standard. We affirm the judgment in its entirety.

FACTS

When Monica M. was 12 years old, she lived in a Sacramento apartment with her mother and defendant, who was her stepfather. At that time, defendant would enter her room in the middle of the night on a regular basis, lift her shirt over her head to fondle her breasts, and reach his hand down her shorts to touch her vagina and buttocks. Defendant did this once or twice a week until Monica turned 14. Monica would squirm away from defendant to get him to stop, but she never told anyone.

In high school, Monica joined the wrestling team. Almost every night Monica would play wrestle with defendant. Defendant would often pin her on her stomach and grind his pelvis into her buttocks. His penis was usually erect.

One day during Monica's ninth grade Christmas break, and while her mother was at work, defendant brought home a bottle of

peppermint schnapps. Defendant and Monica played poker and each time one of them lost a hand, the loser would have to take a shot of alcohol. The game evolved into strip poker. They played strip poker until Monica was naked. Defendant and Monica went into Monica's room and lay down on her bed to watch a movie. Defendant told Monica not to put her clothes back on. Defendant touched her breasts and got on top of her. Monica tried to resist, but defendant inserted his penis into her vagina. Monica was in pain and continually tried to get him off of her. Defendant held her down as he continued to have intercourse with her. When defendant was finished, he told Monica to take a shower and not to tell anyone.

One afternoon between January and July 2002, while Monica was taking a shower and her mother was asleep in another room, defendant entered the bathroom. Defendant removed his shorts and got in the shower with Monica. Defendant grabbed Monica's wrist and turned her so she was facing away from him. Defendant pinned Monica against the wall, tried to get up against her, and touched her buttocks. Eventually, defendant told Monica to finish her shower and got out. When Monica finished her shower, she went to her room and tried to get dressed. Defendant went into Monica's room, ran his hand up her thigh and pushed her face down onto her bed. Defendant got on top of her and started grinding his pelvis against her buttocks. Monica did not call out to her mother.

On July 1, 2002, Monica was home alone with defendant. Defendant entered Monica's room, grabbed her wrists and

handcuffed her to the bed. Monica kicked and squirmed as she tried to get her wrists free. As defendant removed Monica's clothes, she kicked him. Defendant left the room and returned with a yellow fishing rope, which he used to tie her ankles to the footboard. Defendant undressed, left the room and returned with a condom. He put on the condom and began having intercourse with her.

Monica was in pain and uncomfortable and complained to defendant the rope was hurting her ankle. Defendant untied her right ankle and penetrated her vagina with his penis again.

Monica began screaming and trying to kick with her free leg. Defendant then taped her mouth shut and continued to have sex with her. Defendant told Monica he would remove the handcuffs and leave her alone if she would perform oral sex. Monica reluctantly agreed. Defendant untied her left ankle and removed one handcuff. But as he brought his penis to Monica's mouth she refused.

Defendant handcuffed Monica's free hand and continued having sex with her. After about 20 minutes, defendant removed the handcuffs, untied her and ordered her to take a shower. Monica did not tell anyone what defendant did.

A couple of days later, defendant told Monica he did not believe prior statements that she had been virgin, and if she ever lied to him again, he would rape her again. Monica decided to tell her mother. Monica wrote her mother a letter and explained defendant had raped her and she was moving out.

On July 11, 2002, Sacramento County Deputy Sheriff Angela Langier responded to a call about defendant's sexual assault of Monica. Monica and her mother gave Deputy Langier the letter from Monica to her mother and several pages of e-mail correspondence reflecting communications between Monica and defendant posing as "John Jones." Deputy Langier examined Monica's wrists and ankles and observed bruising.

Steven Osborne, a detective assigned to the Child Abuse Bureau with the Sacramento County Sheriff's Department, conducted a follow-up investigation the following evening. Detective Osborne seized two yellow fishing stringers, a pair of handcuffs, a partial roll of duct tape, Monica's bedding, a partially filled bottle of peppermint schnapps, and a computer.

Detective Osborne also set up a pretext phone call so Monica could confront defendant about the rape. The conversation was recorded. Monica offered to recant if defendant promised not to touch her again. Defendant promised never to touch Monica again, told her they will not be left alone again, and apologized for everything that happened.

On July 15, 2002, Cathy Boyle, a nurse practitioner at the U.C. Davis Medical Center, gave Monica a complete physical examination. Boyle discovered a healed deep tear trauma on Monica's hymen. In Boyle's expert opinion, Monica's condition was consistent with sexual abuse.

Detective Vincent Recce, a computer expert for the Sacramento County Sheriff's Department, examined the contents of the computer seized by Detective Osborne. All of the e-mails

had been deleted from the hard drive. Detective Recce was able to recover the contents of defendant's e-mail files. He found correspondence between defendant, using the address "clown95815@yahoo.com" under the name "John Jones," and Monica. In the e-mails, between December 2001 and March 2002, defendant told Monica, among other things, "I would like to do you" and "How do you feel I could use you for a sex toy." (Sic.)

At trial, Kimberly Sable and Esther Cortes, former coworkers of defendant at "Things Remembered," testified that defendant had touched them inappropriately and made sexual comments to them while at work. Sable, who was 17 when she worked under defendant's supervision, testified defendant asked her, among other things, "How do you like to be handled," and whether she wore a g-string or thong. On a separate occasion, defendant grabbed Sable's hand and put it down his pants, touching his penis. Cortes testified defendant, also Cortes's supervisor, grabbed her buttocks on several occasions and stated, "I can't help it" and "Esther, you, I would do." Both women were successful in their sexual harassment suits against defendant.

Defendant testified on his own behalf. He admitted buying peppermint schnapps for Monica and playing poker, but denied playing strip poker and touching her. Defendant admitted to horsing around by handcuffing and hog-tying Monica, but denied ever raping or having sex with her. Defendant denied the sexual misconduct involving Sable and Cortes.

Defendant testified he set up the "clown95815" e-mail address as a concerned parent and posed as a teenager to find out about Monica's conduct. Defendant also testified he knew the pretext phone call from Monica was being recorded.

DISCUSSION

I

Propensity Evidence

Over defendant's objection, the trial court admitted testimony by Kimberly Sable and Esther Cortes of defendant's prior uncharged conduct and e-mail correspondence between Monica and defendant posing as "John Jones." The court determined the evidence was admissible pursuant to Evidence Code section 1108 to show propensity to commit sexual crimes, and Evidence Code section 1101, subdivision (b), to show intent. The court also ruled the evidence was not unduly prejudicial under Evidence Code section 352. Defendant argues the trial court's rulings violated his constitutional rights to due process and equal protection. We disagree.

A. Due Process Challenge to Evidence Code Section 1108

Defendant contends admitting evidence pursuant to Evidence Code section 1108 to show propensity to commit sex offenses violated his federal constitutional right to due process.¹

¹ Evidence Code section 1108, subdivision (a), reads: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

However, the California Supreme Court held Evidence Code section 1108 does not violate due process. (*People v. Falsetta* (1999) 21 Cal.4th 903.) As defendant recognizes, we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

B. *Equal Protection Challenge to Evidence Code Section 1108*

Defendant asserts admitting evidence pursuant to Evidence Code section 1108 violated his federal constitutional right to equal protection because the statute treats those accused of sex offenses differently from those accused of other crimes. Defendant's assertion fails.

"An equal protection challenge to a statute that creates two classifications of accused or convicted defendants, without implicating a constitutional right, is subject to a rational-basis analysis. [Citation.] [¶] Evidence Code section 1108 withstands this relaxed scrutiny. The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law. . . . In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]" (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.)

C. *Admitting Evidence Under Evidence Code Section 1101*

Defendant asserts the uncharged conduct evidence lacked sufficient similarity to the charged crimes to prove intent under Evidence Code section 1101, subdivision (b). Because the evidence is admissible as propensity evidence pursuant to Evidence Code section 1108, we need not discuss this issue.

D. *Abuse of Discretion Under Evidence Code Section 352*

Defendant contends even if the evidence was admissible, the trial court abused its discretion by failing to exclude the evidence under Evidence Code section 352.² Defendant's contention is without merit.

The determination to exclude or admit propensity evidence under Evidence Code sections 1108 and 352 is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.) Unless the trial judge acted capriciously and beyond the bounds of reason, we must affirm. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) This case is not even close.

Before making the decision to admit the propensity evidence, the trial court considered Evidence Code section 352 and whether the propensity evidence was more inflammatory than

² Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

testimony relating to the charged offense. It considered whether there was a risk of confusing the jury, the remoteness in time of the uncharged acts to the charged acts, the risk of undue consumption of time, and whether the evidence was cumulative. After balancing these factors against the evidence's probative value, the court determined the probative value outweighed the prejudicial impact. Under these circumstances, it did not abuse its discretion in doing so.

All relevant evidence is prejudicial to a criminal defendant. But Evidence Code section 352 focuses on undue prejudice when it balances the prejudicial effect with the probative value of the evidence. Defendant was charged with multiple counts of forcibly raping a child. The propensity evidence describing defendant's uncharged acts were not stronger and no more inflammatory than Monica's testimony describing the rape. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 738.) Thus, the propensity evidence did not create a substantial danger of undue prejudice. It was relevant to show defendant's disposition to commit sex offenses and take advantage of younger females under his control or supervision.

II

CALJIC No. 2.50.01

Defendant argues the trial court's use of the 2002 version of CALJIC No. 2.50.01 on propensity evidence violated defendant's federal constitutional right to due process. We disagree.

In *People v. Reliford* (2003) 29 Cal.4th 1007, the California Supreme Court approved the use of CALJIC No. 2.50.01, holding the instruction does not violate due process. The court upheld the constitutionality of the 1999 version of CALJIC No. 2.50.01, and stated in dicta the 2002 revision used here was an improvement. As defendant again acknowledges, we are bound by the decisions of the Supreme Court.

III

Defendant's Motions to Substitute Counsel

Defendant contends the trial court abused its discretion by denying defendant his motions to substitute counsel. Defendant's contention is without merit.

A. Background information

On March 19, 2003, after proceedings commenced, defendant requested the trial court relieve his counsel and appoint another attorney to represent him. The court conducted an in camera hearing to review defendant's request. The defendant stated his attorney had insufficient time to review the discovery and had given defendant the erroneous impression the trial was going to be continued. Defendant stated, "[W]e've never sat down to discuss [Kimberly Sable and Esther Cortes]. . . . I am not getting the representation that I should be getting." Defendant's trial counsel admitted he believed the case would be continued one more time. He stated he was in the process of obtaining the discovery so he could begin reviewing it that day.

Counsel also stated the thrust of the defense had been to let things calm down and see if the case ended up in a better posture for a negotiated settlement. Defendant rejected the offer of 15 years to life his attorney had negotiated.

In denying defendant's March 19, 2003, motion, the trial court stated, "I am confident that [defendant's counsel] understands the issues in this case and that he is prepared once he gets the information that he is currently reviewing and that he has the investigator out acquiring, to very, very competently represent you."

On March 24, 2003, defendant filed a written motion to substitute counsel. The trial court held a second in camera hearing. Defendant alleged his trial counsel was not adequately representing him, failed to sufficiently confer with defendant, was unprepared, and discussed confidential information with defendant's sisters. The trial court denied the motion and explained defense counsel was competently representing defendant.

B. *Analysis*

Motions to substitute counsel, established in *People v. Marsden* (1970) 2 Cal.3d 118, are subject to the following well-known rules. ""When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record

clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations.]” [Citations.]’” (*People v. Hart* (1999) 20 Cal.4th 546, 603.)

“Denials of *Marsden* motions are reviewed under an abuse of discretion standard. [Citation.] Denial ‘is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel. [Citations.]’” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

The trial court provided defendant with two in camera hearings to voice his complaints. Based on the court’s observations of counsel’s representation of defendant and counsel’s statements during the *Marsden* hearings, the court twice determined defendant was receiving competent representation and effective assistance of counsel. The record demonstrates defense counsel skillfully performed his trial duties and achieved a plea offer less onerous than the eventual sentence. Defendant fails to prove the trial court abused its discretion in denying his motion to substitute counsel.

IV

Competency to Stand Trial

Defendant asserts the trial court abused its discretion by declining to declare a doubt as to defendant’s mental competency when defendant was placed on suicide watch during trial and by

denying his motion to be examined by other psychologists.
Defendant's assertion fails.

A. *Background information*

On April 7, 2003, defense counsel informed the court defendant had been placed on suicide watch, was unable to accept visitors, and would not be brought to court. The next day, as defendant remained on suicide watch, the court appointed a licensed psychologist, Janice Nakagawa, Ph.D., pursuant to Evidence Code section 730 to assist in determining whether there existed a doubt as to defendant's ability to understand the proceedings and cooperate with his attorney.

On April 10, 2003, the trial court received the psychologist's report. The report confirmed defendant had attempted to commit suicide and was presently suicidal. However, the psychologist concluded defendant's suicidal state "did not stem from any mental health problems," but rather from understanding the possibility of facing life imprisonment if convicted.

Defense counsel raised his doubt about defendant's competency to stand trial, and he requested the court suspend proceedings and appoint two additional experts to review defendant's competency. Based upon the psychologist's conclusions, the trial court refused to declare a doubt as to defendant's competency to stand trial and denied defendant's motion.

B. Analysis

Penal Code section 1367 provides "that a person is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (*People v. Welch* (1999) 20 Cal.4th 701, 737.)

Penal Code section 1368 states, in pertinent part, if "a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent."

If there is substantial evidence of incompetence to stand trial, "due process requires that a full competence hearing be held as a matter of right." (*People v. Welch, supra*, 20 Cal.4th at p. 738, emphasis omitted.) Substantial evidence exists if the evidence raises a reasonable doubt regarding defendant's competence to stand trial. (*Ibid.*)

After the defendant was placed on suicide watch, the court ordered an expert to evaluate defendant to determine whether there existed a doubt as to his competence to stand trial. The expert's report relayed that defendant was suicidal because he was facing a possible life sentence if convicted. This conclusion goes directly to whether the defendant was able to understand the nature of the criminal proceedings. The defendant was suicidal *because he understood the nature of the*

criminal proceedings and the possibility of life imprisonment, not because of a mental illness that resulted in him being unable to understand the nature of the proceedings.

Substantial evidence also supports the trial court's determination because defendant was able to assist counsel in the conduct of his defense in a rational manner throughout the trial. Initially, while defendant was on suicide watch, defense counsel had limited access to defendant. But otherwise throughout trial, defendant was able to assist counsel. Before being placed on suicide watch, defendant filed two *Marsden* motions, during each of which defendant demonstrated he understood what was occurring and what was at stake. He played a cogent, active role in his defense. On April 14, 2003, after being placed on suicide watch, defendant testified on his own behalf, demonstrating his ability to assist counsel in a rational manner throughout trial.

Under these circumstances, there is substantial evidence of defendant's competence to stand trial. Consequently, the trial court did not abuse its discretion by declining to declare a doubt as to defendant's competence to stand trial.

V

Imposition of Upper and Consecutive Sentencing Terms

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried

to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional findings of fact, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414] (hereafter *Blakely*).)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing (1) the upper terms on the count of assault with intent to commit rape and two of the three counts of rape with force, and (2) consecutive sentences on the three counts of rape with force. He asserts the court erred by relying upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails since defendant did not raise the issue in the trial court.

In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (hereafter *Cotton*), a case decided after its decision in *Apprendi*, the Supreme Court unanimously held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in

violation of *Apprendi* was uncontroverted at trial and supported by overwhelming evidence. (*Cotton, supra*, 535 U.S. at p. 631.)

Such is the case here. The trial court cited the fact defendant took advantage of a position of trust or confidence to commit the offense as reasons for imposing the upper terms and consecutive sentences. (Cal. Rules of Court, rule 4.421(a)(11).) Defendant did not raise an *Apprendi* objection at the time of sentencing, and the facts used in imposing the consecutive sentence were uncontested at trial and supported by overwhelming evidence. Defendant admitted he resided with the victim and was the victim's stepfather. Consequently, defendant has forfeited his right to raise *Apprendi/Blakely*. (*Cotton, supra*, 535 U.S. at p. 631; see *People v. Cruz* (1995) 38 Cal.App.4th 427, 433 [one valid factor is sufficient to support the upper term].)

Moreover, defendant's claim of error regarding the imposition of consecutive terms fails on the merits because the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme.

Penal Code section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple

offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Penal Code section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun*, *supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under Penal Code section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing

decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated *does not create a presumption or entitlement to a particular result*. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely*. In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 542 U.S. at p. ____ [159 L.Ed.2d at p. 417].)

Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.